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The Codes of Conduct

A Code of Conduct applies to the relationship between a utility's regulated merchant function and all of its unregulated affiliated power marketers. The earliest references to code of conduct requirements are in *Heartland Energy Services, Inc., et al.*, 68 FERC ¶ 61,223 (1994) and *LG&E Power Marketing Inc., et al.*, 68 FERC ¶ 61,247 (1994). Because Codes of Conduct are company specific, general FAQs cannot provide appropriate guidance on implementing a specific Code of Conduct. However, below we are summarizing and providing links to two matters relating to compliance with Codes of Conduct.

The Commission requires FERC-regulated investor-owned public utilities with affiliated power marketers to file a Code of Conduct when the public utility applies for authority to sell power, energy or ancillary at market-based rates. The Codes of Conduct assist in preventing affiliate abuse that may take place when the traditional public utility (vertically integrated utility) and its affiliated power marketer transact in ways that result in a transfer of benefits from the traditional public utility (and its captive customers) to the affiliated power marketer (and its shareholders.) *Heartland* at 62,062. [Click here to link "How To Apply for Market Based Rate Authority."](#)

Codes of Conduct versus Standards of Conduct

Although the Codes of Conduct focus on power sales and the Standards of Conduct focus on transmission activities, both types of codes generally include similar types of rules governing behavior, including the independent functioning requirement and a posting requirement if information is shared.

The Codes of Conduct govern the relationship between the entity requesting market-based rates (a public utility, affiliated generator or power marketer) and its affiliated public utility, affiliated generator or power marketer. Unlike the Standards of Conduct, the Commission has not codified a standardized Code of Conduct. Accordingly, each Code of Conduct is specific to the entity that filed the Code. The Codes of Conduct require the public utility's operating personnel to function independently of the affiliated power marketer and typically impose a posting requirement if market information is shared.

The Standards of Conduct govern the relationships between a Transmission Provider and its Marketing and/or Energy Affiliates. The Commission revised and recodified these requirements in [Order No. 2004](#) and they can be found at Part 358 of the Commission's regulations. The same Standards of Conduct apply to each Transmission Provider. As noted, there is no standardized Code of Conduct. Like the Codes of Conduct, the Standards of Conduct rely on an independent functioning requirement and information sharing prohibitions. However, the Standards of Conduct require the

separation of transmission function employees from Marketing or Energy Affiliate employees, while the Codes require the employee of the electric utility to operate separately from the employees of its affiliate. Unlike the Codes of Conduct, the Standards of Conduct contain numerous posting requirements that increase the transparency of the Transmission Provider's activities.

Typical Codes of Conduct

Although the Codes of Conduct have not been codified, the Commission has typically applied five core Code of Conduct requirements. However, each Code of Conduct is unique and one can only rely upon the specific requirements included in a particular company's Code of Conduct for that company. The Codes of Conduct are often included as an attachment to the Commission's order granting market-based rate authority. These Codes of Conduct govern the relationship between an applicant (a generator or power marketer) and its affiliated electric utility:

- (a) To the maximum extent practical, the employees of [Applicant] will operate separately from the employees of the [Traditional electric utility¹];
- (b) All market information shared between [Traditional electric utility] will be disclosed simultaneously to the public. This includes all market information, including but not limited to, any communication concerning power or transmission business, present or future, positive or negative, concrete or potential. Shared employees in a support role are not bound by this provision, but may not serve as an improper conduit of information to non-support personnel;
- (c) Sales of any non-power goods and services by [Traditional electric utility] including sales made through to its affiliated electric wholesale generators or qualifying facilities, to [Applicant] will be at the higher of the cost or market price;
- (d) Sales of non-power goods or services by [Applicant] to [Traditional Electric Utility] will not be at price above market;
- (e) To the extent the [Applicant] seeks to broker power for the [Traditional Electric Utility]:
 - i. [Applicant] will offer [Traditional Electric Utility's] power first;

¹ Under the Codes of Conduct, a "public utility" is used to refer to an investor-owned public utility that owns or controls transmission and has captive generation customers. It may also refer to affiliated power marketers and generators.

- ii. The arrangement between [Applicant] and [Traditional Electric Utility] is non-exclusive;
- iii. [Applicant] will not accept any fees in conjunction with any Brokering services it performs for [Traditional Electric Utility].

Codes of Conduct Investigations and Audits

The following cases provide some examples of the types of action the Commission has taken with respect to violations of the Codes of Conduct.

In 2003, the Commission issued an order approving a Stipulation and Consent Agreement revoking the market-based rate authority of a power marketer for its violations of the Codes of Conduct because the power marketer and the utility engaged in sales of power without prior Commission authorization required by the affiliate's market based power sales tariffs and section 205 of the Federal Power Act. The Commission also required the power marketer to pay a civil penalty of \$750,000 for violating section 214 of the Federal Power Act by charging an unduly preferential rate to an affiliate and refund approximately \$2.1 million of unjustly gained profits. *See Cleco Corporation, et al.*, 104 FERC ¶ 61,125 (2003).

More recently, on May 25, 2005, the Commission issued an order approving an Audit Report outlining the compliance audit findings and recommendations regarding Florida Power Corporation and Carolina Power & Light Company (Progress Companies). *See Florida Power Corporation, et al.*, 111 FERC ¶ 61,243 (2005). Among other things, the Progress Companies did not comply with the Codes of Conduct by: (1) exchanging market information as part of a strategic evaluation of organizational structures for market operations; and (2) organized its Combustion Turbine Operations group in a manner that created the opportunity for the exchange of market information inconsistent with the Codes of Conduct. The Commission required the Progress Companies to credit \$6.4 million back to its customers; restructure its marketing operations; refile its Codes of Conduct and other remedial activities for its improper activities.